

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

800 RIVER ROAD OPERATING COMPANY, LLC  
d/b/a CAREONE AT NEW MILFORD,

Respondent,

and

Case No. 22-CA-204545

1199 SEIU UNITED HEALTHCARE WORKERS  
EAST,

Charging Party.

CHARGING PARTY'S REPLY IN SUPPORT OF MOTION  
FOR PARTIAL WITHDRAWAL OF THE CHARGE

The filings by the General Counsel and the Respondent in opposition to the Union's motion for partial withdrawal of the charge fail to articulate or identify any basis for denying the motion. The Union seeks to withdraw the allegation of the charge addressing the Respondent's imposition of discretionary discipline without giving the Union prior notice and an opportunity to bargain because it has determined after further investigation that the disciplinary actions were for cause and therefore, under *Total Security Management*, 364 NLRB No. 106 (2016), no reinstatement or make-whole remedy is available. Accordingly, there is no live dispute concerning this allegation of the charge.

No party disagrees with the Union's conclusion concerning the merits of the charge; in fact, the Respondent argued for the same conclusion – that the disciplinary actions were for cause – in its briefs to the administrative law judge and the Board. *See*

Respondent's Post-Hearing Brief at 11 n.12, 23; Respondent's Brief in Support of Exceptions at 4 n.2. All parties now agree that the charge has no merit, with the Union seeking withdrawal and the General Counsel and the Respondent seeking dismissal. The only remaining issue is whether, notwithstanding the fact that there is no longer a live dispute concerning the charge, the Board should deny the charging party's withdrawal request in order to rule on the General Counsel's and the Respondent's arguments for overruling *Total Security*.

As set forth in more detail in the Union's motion, the Board routinely grants motions to withdraw a charge if there is no live dispute to be resolved, in order to conserve Board resources and to expedite issuance of a decision in the remaining case. *See* Motion for Partial Withdrawal at 2-3 (quoting *Dow Chemical Co.*, 349 NLRB 104, 104 (2007)). Indeed, in the only reported decision of the last fifty years in which the Board denied a charging party's request to withdraw a charge, *Metropolitan Taxicab Board of Trade, Inc.*, 342 NLRB 1300 (2004), the key consideration was that the specific issue presented by the case, whether the nearly 2000 New York City taxi drivers involved in the case were independent contractors, "was an undisputedly live and important issue to all involved parties." *Dow Chemical Co.*, 349 NLRB at 105.

Moreover, the desire of the General Counsel or a respondent, or the Board for that matter, to address a doctrinal issue has never been a reason for the Board to disapprove withdrawal of a charge as to which all parties agree that it should find no violation and order no remedy. As detailed in the Union's motion, in just the last eight months the Board has summarily granted requests to withdraw charges in cases that presented a doctrinal issue so significant that the Board had issued a public invitation to brief the issue and the U.S. Court of Appeals for the D.C. Circuit, in remanding one of

the cases to the Board, had directed the Board to address the issue. Motion for Partial Withdrawal at 4-5 (discussing *Colorado Fire Sprinkler, Inc.*, Case 27-CA-115977, (order issued Mar. 25, 2019), and *Loshaw Thermal Technology, LLC*, Case 05-CA-158650 (order issued Dec. 14, 2018)). In one of those cases, the General Counsel opposed withdrawal on grounds practically identical to those advanced in his opposition to the instant motion. See *Colorado Fire Sprinkler, Inc.*, Case 27-CA-115977, Counsel for the General Counsel’s Opposition to Charging Party’s Motion for Remand to Region 27 for the Withdrawal of Unfair Labor Practice Charges (filed Mar. 14, 2019) (annexed as Appendix C to Motion for Partial Withdrawal). The Board, summarily granting the withdrawal request, rejected the General Counsel’s arguments without discussion.

In the face of clear Board law requiring approval of withdrawal requests in the absence of a live dispute and consistent Board practice rejecting the opportunity to rule on a significant doctrinal issue as a reason to deny such a request,<sup>1</sup> neither the General

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<sup>1</sup> In addition to Board law and practice, there are broadly accepted jurisprudential considerations that counsel against adjudication of legal issues in the absence of a live dispute. The Supreme Court summarized them in *United States v. Fruehauf*, 365 U.S. 146, 157 (1961):

We do not reach that question on this appeal. For we cannot but regard it—abstracted as it has become, in the course of these proceedings, from the immediate considerations which should determine the disposition of appellees’ motions ...—as other than a request for an advisory opinion. Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give.

The Board’s decision in *Total Security* and the General Counsel’s and the Respondent’s arguments for overruling it leave no doubt but that the issue the Board is being asked to decide in the absence of a live dispute involves precisely the kind of “multi-faced situation embracing conflicting and demanding interests” to which the Court referred.

Counsel nor the Respondent have cited a single case in which the Board has denied a withdrawal request despite the absence of a live dispute, or in order to rule on a doctrinal issue of interest. The only cases that the General Counsel cites are *New York Central Transport Co.*, 141 NLRB 1144 (1963), and *United Mechanics' Union Local 150-F (American Photocopy Equipment Co.)*, 151 NLRB 386 (1965). Both are relied on by the Respondent as well. In *New York Central Transport*, the respondent excepted to the trial examiner's denial of the charging party's request to withdraw the charge, and the Board affirmed the denial, stating, "once a charge is filed, the General Counsel proceeds, not in the vindication of private rights, but as the representative of an agency entrusted with the power and duty of enforcing the Act in which the public has an interest." 141 NLRB at 1145 n.2. In *American Photocopy Equipment*, the trial examiner had denied a request by the charging party to withdraw the charges and the respondents moved the Board to grant the withdrawal request that the trial examiner had denied. The Board denied the respondents' motion, citing *New York Central Transport* and closely paraphrasing the Board's one-sentence explanation of the denial. 151 NLRB at 386 n.1.

Both of the cited decisions are completely inapposite to the withdrawal of charges as to which no live dispute remains. Neither decision addresses the issue, and the decisions themselves make clear that there in fact remained live disputes in both cases. In *New York Central Transport*, the trial examiner's recommended order included reinstatement of the charging party and back pay. 141 NLRB 1153. The Board adopted the order. *Id.* at 1145. In *American Photocopy Equipment*, the trial examiner's recommended order, also adopted by the Board, included relief running to the benefit of a non-party secondary employer, in addition to relief for the charging party. 151 NLRB at 395-96. Furthermore, in both cases, while the charging parties had made withdrawal

requests to the trial examiner, neither made a request to the Board; the withdrawal requests denied by the Board were made by the respondents alone. See 141 NLRB at 1145 n.2; 151 NLRB at 386 n.1.<sup>2</sup> Thus, neither of the cited decisions have any application to this matter, and it is no surprise that the Board, in summarily granting the withdrawal request in *Colorado Fire Sprinkler*, did not see the need to address the General Counsel's reliance on them in opposing withdrawal. See Motion for Partial Withdrawal, Appendix A (order) & Appendix C (General Counsel's Opposition).

All of the other arguments advanced by the General Counsel and/or the Respondent are addressed above or in the Union's motion. They include that (1) "[a] resolution of the *Total Security* issue raised in this case has repercussions far beyond any disputes between the Charging Party and Respondent," General Counsel's Opposition at 2, and the Board should therefore deny withdrawal of the charge notwithstanding the absence of a live dispute to be resolved (discussed above and in Motion at 4-5); (2) the matter has been fully litigated and fully submitted to the Board (discussed in Motion at 6); and (3) the "Respondent, the Union, and the employees deserve to know how they should proceed moving forward," Respondent's Opposition at 8 (discussed in Motion at 6). All must be rejected for the reasons previously set forth.

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<sup>2</sup> In *American Photocopy Equipment*, there is nothing to suggest that the secondary employer might have joined in the initial withdrawal request or assented to the request in any way.

## **Conclusion**

For the reasons set forth above and in the Union's motion for partial withdrawal of the charge, it is respectfully requested that the Board approve the Union's request to withdraw the allegation of its charge that the Respondent violated the Act by failing and refusing to give the Union notice and an opportunity to bargain before imposing discretionary discipline.

Dated: New York, New York  
July 25, 2019

Respectfully submitted,

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STATEMENT OF SERVICE

The charging party's reply in support of its motion for partial withdrawal of the charge is being served today on the other parties by e-mail to counsel at the e-mail addresses set forth below:

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Dated: New York, New York  
July 25, 2019

s/ William S. Massey  
William S. Massey